SUPREME COURT, U. S.

JAN 3 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1040

DISTRICT OF COLUMBIA, *et al.*,
Petitioners.

v.

MICHAEL H. MARSH,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on October 5, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported and is set forth in Appendix A at pages 1 through 7a. The order of the District Court is set forth in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on October 5, 1973. Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in an action for damages against District of Columbia police officers, an exercise of federal question jurisdiction pursuant to 28 U. S. C. § 1331(a) justifies the invocation of the doctrine of pendent jurisdiction against the District of Columbia, its police chief, and other police superiors.

2. Whether, in light of the unique status of the District of Columbia which makes it constitutionally distinct from the States, the Court of Appeals erroneously construed 28 U. S. C. § 1331(a) as conferring federal question jurisdiction in an action to redress alleged violations of civil rights by District of Columbia police officers acting in a purely local capacity.

STATUTE INVOLVED

Act of March 3, 1875, 18 Stat. 470, § 1, as amended, 28 U. S. C. § 1331(a), **Federal question; amount in controversy; costs:**

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

STATEMENT

In a civil action filed in the United States District Court for the District of Columbia on February 18, 1971, respondent sought to recover damages for an alleged assault and battery and an assertedly unlawful arrest and detention. Named as defendants were the District of Columbia (hereinafter "the District"), its Metropolitan Police Chief, three other police superiors (John Doe #2, #3, and #5), and three subordinate Metropolitan police officers.

In his complaint, respondent invoked the District Court's jurisdiction under 42 U. S. C. §§ 1983 and 1985 (Appendix C at 13a). He alleged that on February 19, 1970, while watching an antiwar demonstration in the lobby of his dormitory at George Washington University he was assaulted by petitioner Hollingsworth and an unnamed fellow Metropolitan Police officer (John Doe #1), and that he was thereafter unlawfully arrested by petitioners Hollingsworth, Heane, and John Doe #1 (Appendix A at 5, Appendix C at 14a-16a). Respondent further alleged that the District, the Metropolitan Police Chief, and police superiors John Doe #2 and #3 failed in their duty to train, instruct and supervise the arresting and assaulting officers, failed to prevent the occurrence of the assault and arrest, and conspired with the arresting and assaulting officers to deprive him of his constitutional rights (Appendix C at 17a). Respondent went on to allege that he was thereafter booked and processed by John Doe #4 in a manner which caused him to be falsely imprisoned and unlawfully detained, in violation of his constitutional rights; that such action resulted from the failure of the booking officer's superior (John Doe #5), the Metropolitan Police Chief, and the District to properly train, instruct, supervise and control John Doe # 4, and was attributable to a conspiracy among these defendants (Appendix C at 17a-18a).

In their answers to the complaint, the District, the Metropolitan Police Chief, and petitioners Hollingsworth and Heane denied the wrongdoing attributed to them and pretrial discovery proceedings were subsequently commenced. Prior to the completion of pretrial discovery proceedings, this Court, on January 10, 1973, held in *District of Columbia* v. *Carter*, 409 U. S. 418, that the District of Columbia was not a state or territory within the meaning of 42 U. S. C. § 1983 and hence not amenable to the District Court's jurisdiction there-

under, as respondent had asserted in his complaint. In light of *Carter*, petitioners requested the District Court to certify the case to the District of Columbia Superior Court pursuant to the District of Columbia Court Reform and Criminal Procedure Act of 1970 (84 Stat. 473 et seq., hereinafter "the Court Reform Act"). See D. C. Code, 1973, § 11-922(b) (Appendix D, *infra*). Respondent opposed the motion claiming that, notwithstanding *Carter*, the District Court had an independent basis for exercising jurisdiction pursuant to 28 U. S. C. § 1331(a) (Appendix E, *infra*). On April 26, 1973, the District Court certified the case to the District of Columbia Superior Court (Appendix B, *infra*). On October 5, 1973, the United States Court of Appeals for the District of Columbia Circuit summarily reversed the certification order, concluding that the District Court had jurisdiction over the assaulting and arresting officers under 28 U. S. C. § 1331(a), and, on such a basis, ruled that, under the doctrine of pendent jurisdiction, the District Court could entertain respondent's claims against the District, the Metropolitan Police Chief, and the various police superiors (Appendix A at 7).

REASONS FOR GRANTING THE WRIT

1. In concluding that, under the doctrine of pendent jurisdiction, the District Court may entertain respondent's action against the District of Columbia, the Metropolitan Police Chief, and the other police superiors, the Court of Appeals resolved an issue which, under this Court's recent decision and express pronouncement in *Moor* v. *County of Alameda*, 411 U. S. 693, 715 (1973), partakes of the magnitude and importance sufficient to warrant the exercise of this Court's certiorari jurisdiction. In *Moor*, a municipality and its subordinate officers were sued in a federal court under 42 U. S. C. § 1983 and § 1985 and a vicarious liability theory asserted as to the municipality. This Court, consistent with its previous

decision in *Monroe* v. *Pape*, 365 U. S. 167 (1961), held that there was no basis for the exercise of federal jurisdiction over the municipality under the 1871 Ku Klux Klan Act invoked by the petitioner (411 U. S. at 698-710) and went on to discuss petitioner's additional contention that, given the amenability of the individual defendants to federal jurisdiction under the 1871 Act, the claim against the municipality could be federally entertained under the doctrine of pendent jurisdiction (id. at 710-715). In so doing, this Court noted a split of lower federal Court authority on the question of the existence of pendent jurisdiction (id. at 713-715) and specifically stated that: "Whether there exists judicial power to hear the state law claims against the County is, in short, a subtle and complex question with far-reaching implications." (Id. at 715). This Court refused to resolve the question only because "the District Court [with the agreement of the Court of Appeals], in the exercise of its legitimate discretion, properly declined to join the claims against the County * * *" (id. at 715; cf. 458 F. 2d 1217, at 1221).

Here, unlike in *Moor*, the pendent jurisdiction question is indeed ripe for resolution by this Court. Under this Court's decision in *District of Columbia* v. *Carter*, 409 U. S. 418 (1973), respondent's claims under 42 U.S.C. §§ 1983 and 1985 as to all of petitioners could not be entertained by the District Court, as the Court of Appeals plainly recognized (Appendix A at 2a-3a). However, the Court of Appeals noted, consistent with this Court's dictum in *Carter* (409 U. S. at 432-433), that respondent alleged a sufficient constitutionally oriented tort action against the arresting officers under 28 U.S.C. § 1331(a) (but see discussion, *infra*). Proceeding from that premise, the Court of Appeals went on to direct the District Court to permit invocation of the doctrine of pendent jurisdiction as to the "superior police officers and the District of Columbia" (Appendix A at 7a and, in so doing,

unmistakably provided ample basis for this Court's resolution of the "subtle and complex [pendent jurisdiction] question with far-reaching implications" which the Court found unnecessary to resolve in *Moor* (411 U. S. at 715).

The question takes on added importance here because, unlike in *Moor*, we are not concerned with the jurisdiction of the federal judicial system *vis-a-vis* that of a state. This case, in contrast, involves two federally created judicial systems. In a more specific context it involves the system of courts recently created by the Court Reform Act and charged by Congress with the responsibility of deciding all controversies of a local nature—controversies which had theretofore created "a crises in the judicial system of the District of Columbia" because the District Court's "case loads had become unmanageable * * *." See *Palmore* v. *United States*, 411 U. S. 389, 408-409 (1973).[1] Such a legislative and historical background should surely be considered in light of this Court's pronouncement in *Moor* that the jurisdiction of federal courts, including pendent jurisdiction, is "* * * subject, within the limits of the Constitution, to the will of Congress, not the courts." 411 U.S. at 715. Clearly, therefore, given the overriding significance of the express "will of Congress" reflected in the Court Reform Act concerning jurisdiction over controversies of a local nature—see *Preiser* v. *Rodriquez*, 411 U. S. 475, 493, n. 10 (1973) —the conclusion that the pendent jurisdiction ruling of the Court of Appeals is sufficiently important to warrant this Court's review is inescapable.

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[1] The pendent jurisdiction holding of the Court of Appeals extends to respondent's claims as to the District, the Metropolitan Police Chief and three other police superiors and, as such, plainly requires that the District Court take cognizance of an action in which nonfederal aspects are significantly predominate, contrary to the basic purpose of the Court Reform Act which manifestly was to require that matters of this kind be litigated in the District of Columbia Superior Court.

2. Apart from pendent jurisdiction considerations, the ruling of the Court of Appeals presents the more basic question of whether 28 U. S. C. § 1331(a) was ever intended to vest federal question jurisdiction in the United States District Court for the District of Columbia where, as here, an alleged violation of civil rights is attributed to District of Columbia officers acting in a purely local capacity.

As this Court recently observed in *District of Columbia* v. *Carter*, *supra*, 409 U. S. at 427-428, n. 20, § 1331(a) had its genesis in Section 1 of the Act of March 3, 1875, 18 Stat. 470 (hereinafter "the 1875 Act"). That Act was entitled "an Act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts and for other purposes." It dealt essentially with three types of federal jurisdiction: diversity of citizenship jurisdiction, federal removal jurisdiction, and federal question jurisdiction. It is significant, however, that the Act's diversity provision (18 Stat. 470, § 1) was then insufficient to confer federal jurisdiction in an action in which one of the two parties was a citizen of the District of Columbia as opposed to a State. See *Barney* v. *Baltimore City*, 73 U. S. (6 Wall.) 280, 287 (1867); *Cameron* v. *Hodges*, 127 U. S. 322 (1888). Federal jurisdiction in an action of this kind simply could not be invoked until Congress specifically legislated (Act of April 20, 1940, 54 Stat. 143) with respect to the District in a diversity context. It is likewise significant that the extensive removal provisions of the 1875 Act (18 Stat. 470-472, §§ 2 through 7) were obviously inapplicable to the courts of the District of Columbia as opposed to state courts. A review of this background in light of historical factors will demonstrate that there exists a question of overriding importance as to whether the 1875 Act's federal question provision is similarly inapplicable where, as here, that pro-

vision is invoked as a basis for federal jurisdiction in connection with a purely local civil rights matter.

Acting pursuant to Article I, Section 8, Clause 17, of the Constitution, Congress has traditionally provided District residents with a judicial system designed to redress grievances arising in a local context, whether or not of constitutional dimension. *O'Donoghue* v. *United States*, 289 U. S. 516, 545-548 (1933); *District of Columbia* v. *Carter*, *supra*, 409 U. S. at 429-430. As early as 1801 "the jurisdiction of the courts of the District of Columbia was made more extensive than that of any other court in the country, it being * * * [that of] a local and Federal court, situated at the seat of Government." See Noel, *The Court House of the District of Columbia*, Law Reporter Printing Co., Washington, 1939, at 49-53. See also 2 Stat. 103, 105-106. The historical availability of a congressionally created court to a resident of a state as a forum to redress a constitutionally oriented grievance was quite a different matter. Until 1875, Congress refrained from providing the lower federal courts with general federal question jurisdiction, and relied on the state courts to vindicate essential rights arising under the Constitution and federal laws. See *Palmore* v. *United States*, 411 U. S. 389, 401 (1973); *Zwickler* v. *Koota*, 389 U. S. 241, 245 (1968).

As a post-Civil War measure, the 1875 Act was enacted for the purpose of "providing an impartial forum for the consideration of those federal question cases which might be subject to bias in the state courts." See Bergman, *Reappraisal of Federal Question Jurisdiction*, 46 Mich. L. Rev. 17, 29-30 (1947). Unlike those Acts of Congress which previously and subsequently conferred judicial power for the adjudication of local disputes under Article I, Section 8, Clause 17, of the Constitution, the 1875 Act derived from Article III, Section 2, Clause 1, of the Constitution. See *Romero* v. *International Term.*

Co., 358 U. S. 354, 363-364, 366-367 (1959); *Lynch* v. *Household Finance Corp.*, 405 U. S. 538, 548 (1972). As an Article III-oriented measure, the 1875 Act was necessarily designed to deal with "affairs of national concern" as opposed to matters of local concern "warranting distinctive treatment" by Congress under Article I, Section 8, Clause 17. *Palmore* v. *United States*, *supra*, 411 U. S. at 408. Indeed, at the time Article III itself was drafted, "[t]here is no evidence that the Founders, pressed by more general and immediate anxieties, thought of the special problems of the District of Columbia in connection with the judiciary. This is not strange, for the District was then only a contemplated entity. * * *" *National Ins. Co.* v. *Tidewater Co.*, 337 U. S. 582, 587 (1949). And "neither the aim of the Act of 1875 to provide a forum for the vindication of new federally created rights, nor the pressures which led to its enactment, suggest, even remotely, the inclusion of * * * [locally oriented constitutional claims] within the scope of that statute"—claims which throughout previous years local courts of congressional creation "had been completely adequate to the task" of resolving through the exercise of Article I jurisdiction. Cf. *Romero* v. *International Term. Co.*, *supra*, 358 U. S. at 368-369.

Quite recently, in *Lynch* v. *Household Finance Corp.*, *supra*, this Court observed that, although there was very little discussion of the 1875 Act before its enactment, in contrast to the extensive congressional debate that attended the passage of the 1871 Act construed in *Carter*, *supra*, the considerations attending the enactment of the 1875 Act were similar to those attending the enactment of the 1871 Act (405 U. S. at 548). In that connection, the Court specifically noted that the 1875 Act was "like the Act of 1871, an expansion of national authority over matters that, before the Civil War, had been left to the States," and, as such, "'clearly * * * part of, rather than an exception to, the trend of legislation which pre-

ceded it'" (id.). The Court additionally pointed out that the 1875 Act was "'originally introduced in the House of Representatives in the form of a bill to amend the removal statute'" (which as previously noted could have had no applicability to the courts of the District of Columbia as opposed to state courts) and that "the passage of the Act, despite the lack of debate, has been regarded as the 'culmination of a movement * * * to strengthen the Federal Government against the states'" (id. at n. 14).

In *District of Columbia* v. *Carter*, *supra*, this Court, in pointing out that similar considerations of federalism gave rise to the enactment of the 1871 Act, specifically noted that, in approving that measure, the Reconstruction Congress recognized the need for original federal court jurisdiction as a means to provide federal control over the "unconstitutional actions of state officials" (409 U. S. at 428). The Court went on to make clear, however, that historical considerations of this kind are wholly at variance with the notion that Congress intended the federal jurisdiction provisions of the 1871 Act to apply in cases involving the unconstitutional actions of the District and its officials, stating (409 U. S. at 429) that:

> "There was no need, however, to create federal court jurisdiction for the District of Columbia. Even prior to 1871, the courts of the District possessed general jurisdiction over both federal and local matters. Act of Mar. 3, 1863, c. 91, 12 Stat. 762. Thus, *the jurisdictional aspects of § 1 of the 1871 Act were entirely superfluous with respect to the District. Moreover, while Congress was unable to exert any direct control over the actions of state officials, it was authorized under Art. I, § 8, cl. 17, of the Constitution to exercise plenary power over the District of Columbia and its officers.* * * *" (Emphasis added.)

In light of these considerations, it becomes apparent that there is a highly important question as to whether

Congress similarly viewed the federal question jurisdictional aspects of § 1 of the 1875 Act as "entirely superfluous with respect to the District" and intended that purely local controversies, such as that involved here, be resolved exclusively by the local judiciary under local jurisdiction-conferring statutes such as the Court Reform Act,[2] instead of by the federal courts of the District of Columbia under the 1875 Act. Or as this Court said in *Romero* v. *International Term. Co., supra*, 358 U. S. at 379:

> "* * * The Act of 1875 is broadly phrased, but it has been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the Act's function as a provision in the mosaic of federal judiciary legislation. It is a statute, not a Constitution, we are expounding.
>
> "The considerations of history and policy which investigation has illuminated are powerfully reinforced by *the deeply felt and traditional reluctance of this Court to expand the jurisdiction of the federal courts through a broad reading of jurisdictional statutes.* * * *" (Footnote omitted; emphasis added.)

To be sure, whether the Court of Appeals has unreasonably expanded federal jurisdiction through "a broad reading of" the 1875 Act and improperly taken cognizance of a purely local civil rights dispute which the local judiciary is fully equipped to resolve under the Court Reform Act is a truly substantial question which this Court should settle with finality.

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[2] Congress indeed recognized as much in the Court Reform Act itself when it provided in that Act that "for purposes of" Chapter 85 of Section 28 of the United States Code, which contains § 1331 (a), "references to laws of the United States or Acts of Congress do not include laws applicable exclusively to the District of Columbia." See 84 Stat. 590, 28 U.S.C. § 1363.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the holding of the Court of Appeals raises a pendent jurisdiction question of recognized importance under this Court's clear pronouncements in *Moor* v. *County of Alameda*, 411 U. S. 693, 715 (1973), and presents an equally important question under the recently enacted District of Columbia Court Reform Act. In addition, the court's holding presents a substantial question concerning the amenability to federal question jurisdiction under 28 U. S. C. § 1331(a) of District of Columbia officers acting in a local capacity under locally applicable laws. To the end that these important questions be promptly settled with finality, the petition for a writ of certiorari should be granted.

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